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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 290

STEWART OIL COMPANY, a Corporation; MICHIGAN OIL COMPANY, a Corporation; STEWART PRODUCERS, INC., a Corporation; KENNETH PATTERSON; G. F. STEWART; W. ROLLAND STEWART; FRANK J. TIERNAN and MORRIS YARBROVE,

Plaintiffs-Appellees,

vs.

SOHIO PETROLEUM COMPANY,

Defendant and Counter Claimant,

vs.

WALTER E. KLINE; STELLA P. KLINE; R. E. HAYES; W. T. FREDERKING and A. P. WAGEMANN,

Counter Defendants-Appellants,

and

CARL E. MOSES; DAVID R. STEWART and DONK BROS. COAL & COKE COMPANY,

Counter Defendants-Appellees.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Petitioners, Edward W. Kline and Ruth Lynch, administrators of the Estate of Walter E. Kline, deceased; R. E. Hayes; W. T. Frederking and A. P. Wagemann, pray that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Seventh Circuit, entered on April 15, 1963.

OPINIONS BELOW.

The District Court wrote a memorandum opinion on a motion to dismiss. It is attached hereto as Appendix "A" infra p. 1a, and is reported in 185 F. Supp. 765.

The District Court's opinion on the merits is attached hereto as Appendix "B" infra p. 8a, and is reported in 202 F Supp. 952.

The opinion of the Court of Appeals is attached hereto as Appendix "C" infra p. 21a.

The judgment or decree of the Court of Appeals is attached hereto as Appendix "D" infra p. 27a.

JURISDICTION.

The decree or judgment of the Court of Appeals was entered April 15, 1963 (Appendix "D" infra p. 28a.) The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254 (1) and Rule 38, Sec. 5(b) of the Supreme Court.

QUESTIONS PRESENTED.

1. Did the trial court have jurisdiction of the parties and subject matter in accordance with the Constitution of the United States and the statutes of the United States and the State of Illinois, as construed by the courts?

2. Were the lower courts in error in holding that oil and gas were conveyed by the 1907 "Warranty Deed to Coal and Mining Rights?" Was that error in view of (1) all of the

wording in the conveyance, (2) the interlineation of the words "at coal depth" by typewriter in the printed form, (3) all of the evidence, and (4) the uncontroverted evidence, oral and documentary, that the parties did not intend the printed words "other mineral" of the form to include oil and gas, nor any surface rights, nor any rights whatever below coal depth of 125 to 380 feet below the surface, but only coal and other solid minerals necessarily mined with coal at such coal depth, access being gained underground from other lands?

3. In the alternative, were the lower courts in error in not reforming that "Warranty Deed to Coal and Mining Rights" to clearly show that intention and limitation?

4. Shall the court adjudicate the realestate title as between the divergent groups of claimants so as to decide which of the two opposing sides of the controversy is entitled to the accumulated and future proceeds from oil recovered and to be recovered from the land?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

	Appendix "E" herein
Constitution of the United States, Art. III, Sec. 2	28a
28 U.S.C.A., Sec. 1332	28a
28 U.S.C.A., Sec. 1335	28a
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28 U.S.C.A., Sec. 1392	29a
28 U.S.C.A., Sec. 1655	29a
Illinois Revised Statutes, Ch. 110, Sec. 7	30a

STATEMENT OF CASE.

Plaintiffs, citizens of the State of Michigan, filed suit against Sohio Petroleum Company, an Ohio Corporation authorized to do business in the State of Illinois. The suit was filed in the District Court of the United States for the Eastern District of Illinois. The suit demanded proceeds from the sale of oil produced from lands in Bond County, Illinois.

Sohio Petroleum Company filed an answer to the complaint and a counterclaim of inter-pleader. The counterclaim was later amended, and the oil company admitted the purchase of the oil from the premises and stated that adverse claims had been filed to the proceeds, and stated that in order to determine the rights to the proceeds it would be necessary to add additional parties. The amended counterclaim asked that Sohio not be compelled to become involved in the dispute and that certain parties be added to the suit, and that the Court determine the parties entitled to the money withheld by Sohio and also money that would be accumulated in the future by reason of the purchase of oil from said property.

The parties added were Donk Bros. Coal and Coke Company, an Illinois Corporation, Carl E. Moses and David R. Stewart, citizens of Illinois, and these parties were referred to in the trial court and briefs as Donk, et al.; Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann, all citizens of Illinois, referred to in the trial court and in the briefs as Kline, et al. In addition, John J. Steiner and Josephine M. Steiner, citizens of Illinois, were made parties, but did not appear and were defaulted.

The dispute between plaintiffs and Donk Bros., et al., aligned on one side, and Kline, et al., aligned on the other side, arose out of a deed to said premises.

The original defendant, Sohio Petroleum Company, was discharged pursuant to an interlocutory decree.

Plaintiffs produced oil from the Southeast Quarter of the Southeast Quarter of Section 29, Township 6 North, Range 4 West of the Third Principal Meridian, Bond County, Illinois, pursuant to an oil and gas lease dated October 21, 1955, from Donk Bros. Coal and Coke Company, lessor, to Carl E. Moses and David R. Stewart, lessees, and assigned to plaintiffs, subject, only, to overriding royalty interests, aggregating a 3/32nds of 7/8ths of the oil and gas so produced and marketed, reserved unto the lessees.

Donk Bros. Coal and Coke Company acquired its ownership in the premises by quit-claim conveyance from Theodore Rassieur, agent and attorney for Donk Bros., who had been vested with title by the Warranty Deed to Coal and Mining Rights dated September 21, 1907, from Samuel J. Brown (unmarried), as Grantor, to Theodore Rassieur, as Grantee, conveying:

> "all coal and other mineral under the surface of said land' together with the right to mine and remove said coal and other mineral and the right to conduct mining operations under the surface of said tract of land therefor, and the right to use all rooms, entries and mining ways (at coal depth), under the surface of said tracts of land as and for mining-ways to and from beds of coal or other mineral in other lands." (The words "at coal depth" are interlined by typewriter in the original instrument.)

Walter E. Kline, Stella P. Kline and R. E. Hayes and their oil and gas lessees, W. T. Frederking and A. P. Wagemann, claim ownership of the oil and gas from said premises, including the funds placed on deposit by Sohio, by mesne conveyances from one Albert T. Brown, being the Grantee of a Warranty Deed from the same Samuel J. Brown, as Grantor, dated, also, on September 21, 1907, covering the forty acre

tract, with other lands, but specifically providing: "(coal, etc. underlying said premises reserved, same having been heretofore sold)".

The pleadings filed by Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann, referred to as Kline, et al., alleged that the oil and gas rights were not conveyed by the above described "coal and other mineral deed" from Samuel J. Brown to Theodore Rassieur, but were conveyed by the deed from Samuel J. Brown to Albert T. Brown, and claimed, (a) That the "coal and other mineral deed" conveyed no oil and gas as a matter of law, and (b) That if the legal effect of the deed is otherwise then the inclusion of oil and gas is the result "of either the mutual mistake of the grantor, grantee and grantee's attorney who prepared the deed, or the mistake of grantor or the fraud of the grantee and or his successors" and, therefore, should be accordingly corrected by reformation.

The plaintiffs contended, (a) The "coal and other mineral deed" from Samuel J. Brown to Theodore Rassieur did include and convey the oil and gas as a matter of law; and (b) The alleged right of deed reformation (so as to exclude the oil and gas) is not available as against the intervening rights of third parties including the plaintiffs.

Carl E. Moses and David R. Stewart contended, (a) The "coal and other mineral deed", from Samuel J. Brown to Theodore Rassieur did include and convey the oil and gas as a matter of law; and (b) That the said deed is not in any event subject to the alleged right of reformation as to them.

The position of Donk Bros. Coal and Coke Company was identical with that of the plaintiffs, except that they are not third parties insofar as the question of reformation is concerned, and they contended that the facts did not warrant the reformation of the deed as requested.

The contentions of the plaintiffs, citizens of Michigan, and the counterdefendants, Carl E. Moses, David R. Stewart and Donk Bros. Coal and Coke Company, citizens of Illinois, were identical, except that Donk Bros. Coal and Coke Company could not claim to be innocent third parties. On the other side were Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann, all citizens of Illinois.

In order to judge the case, the trial court had to determine title to the property in Bond County, Illinois. Bond County, Illinois, is not within the territorial limits of the United States District Court for the Eastern District of Illinois, but is in the territorial limits of the United States District Court for the Southern District of Illinois.

In the trial court, Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann contended that the court did not have jurisdiction for the reason that the court could not adjudicate title to real estate outside the territorial limits of the court, and for the further reason that the alignment of the parties demonstrated a dispute between citizens of Michigan and Illinois on one side and citizens of Illinois on the other side.

The trial was held March 21st, 22nd and 23rd, 1960, and the plaintiffs and the counterdefendants Moses and Stewart, and counterdefendant Donk Bros. Coal and Coke Company, proceeded on the theory that the warranty deed to coal and mining rights conveyed oil and gas as a matter of law and was not subject to construction or reformation. They rested their cases after introducing in evidence various exhibits including deeds, oil and gas leases and assignments thereof.

Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann offered a number of witnesses and exhibits designed to show the circumstances surrounding the transaction and the intention of the parties.

The trial court held that the United States District Court for the Eastern District of Illinois had jurisdiction to adjudicate the property rights to land lying outside of the district, and that the action in question was in personam and therefore transitory. The trial court further held, with reference to the merits, that the established law of Illinois was that "coal and other mineral" does convey oil and gas as a matter of law. The deed in question was dated September 21st, 1907.

The United States Court of Appeals for the Seventh Circuit affirmed the trial court.

A more detailed statement of the case appears in the Kline, et al. Court of Appeals appendix and briefs filed with the record in the Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT DID NOT HAVE JURISDICTION OF THE PARTIES AND SUBJECT MATTER FOR THREE REASONS. A. THERE WAS NOT THE REQUIRED DIVERSITY OF CITIZENSHIP. B. THE SUIT IS SPECIFICALLY AND NECESSARILY AN ATTEMPT TO ADJUDICATE THE TITLE TO REAL ESTATE OUTSIDE THE JURISDICTION OF THE TRIAL COURT. C. THE DEPOSIT WITH THE COURT BY THE INTERPLEADER DOES NOT PLACE JURISDICTION IN THE COURT, WHERE IT WOULD OTHERWISE LACK JURISDICTION. JURISDICTION DETERMINES DEPOSIT, DEPOSIT DOES NOT DETERMINE JURISDICTION

United States courts have no jurisdiction except that which is conferred upon them by the constitution and laws of the United States. The presumption persists throughout the case that the court is without jurisdiction unless the contrary affirmatively appears. The jurisdiction must arise from the law and not merely by consent of the parties. *People's Bank v. Calhoun* (1880), 102 U.S. 256, 26 L. Ed. 101; *Robertson v. Sears* (1878), 97 U.S. 646, 24 L. Ed. 1057; *Parker v. Overman* (1890), 141 U.S. 81, 83.

A. THERE WAS NOT THE REQUIRED DIVERSITY OF CITIZENSHIP.

There are only two sides to the controversy. On one side are those who claim through the coal company grantee of a "Warranty Deed to Coal and Mining Rights" from a 1905 farm owner. On the other side are those who claim through an oil and gas lease from a 1956 owner of the remainder in the land. There is no dispute among those on each side of the controversy, regardless of how they are designated in the plead-

ings. They worked together throughout the acquiring of the interests in the property, the pleadings, the trial and the appeal.

Originally a part only of the closely related parties on the coal company side of the controversy, and who were Michigan citizens, sued in the Eastern District of Illinois the oil company of Ohio which had purchased oil from the premises. They alleged the Bond County land (in the Southern District of Illinois).

The oil company examined the title. It discovered the omitted parties and the disputed title to the real estate. The oil company filed an interpleader alleging the omitted parties and the title dispute, and deposited the proceeds up to a certain date with the court. It alleged the condition of the title, the fact that the land was in Bond County in the Southern District of Illinois, the names and citizenship of the claimants from Illinois and from Michigan on the coal company side of the controversy, and the names and citizenship of the claimants from Illinois on the other side of the controversy. It requested the court to adjudicate the title to the real estate, and alleged that it had no interest in the controversy, and asked to be dismissed with its costs and attorney fee. The trial court accordingly dismissed the interpleading oil company from the case and allowed its costs and attorney fee.

This suit is not within the jurisdiction of the Court for the reason that it does not involve a controversy between citizens of different states as provided by the Constitution of the United States, Art. III, §2, and the judicial construction of that section.

Furthermore, it is not within the jurisdiction of the Court for the reason that it does not involve "two or more adverse claimants of diverse citizenship as defined by Section 1332" of

the Judiciary Act. Title 28 U.S.C.A., par. 1335, referring to par. 1332.

Prior to the complete revision of the Judiciary Act in 1948, there were differing opinions regarding complete diversity and the relevance of the citizenship of the interpleader. Some based this definition of diverse citizenship on the Judiciary Act and others on the Interpleader Act. By the revision both were brought together. Now there must be "diverse citizenship as defined by section 1332" of the Judiciary Act.

Harry G. Fins, in his recent edition of Federal Jurisdiction and Procedure, published in 1960, discusses this point. Chapter II on page 6 is entitled Jurisdiction in Civil Cases. On the same page under the subhead A., Diversity of Citizenship, appears the following:

> "(1) Complete diversity is required. Therefore, when there are two or more plaintiffs or defendants, all of the parties on one side of the litigation must be citizens of a state different from any of the parties on the other side. • • • If A, a citizen of Illinois, and B, a citizen of Ohio, sue C, a citizen of New York, D, a citizen of California, and E, a citizen of Illinois, diversity is destroyed because there are Illinois citizens on both sides of the litigation.
>
> (2) • • • The intervention or subsequent joinder of one who is an indispensable party ousts the jurisdiction of the court if diversity of citizenship is thereby destroyed."
>
> *Strawbridge* v. *Curtiss* (1806), 3 Cranch 267, 2 L. Ed. 435; *Susquehanna and Wyoming Valley Railroad and Coal Company v. Blatchford* (1871), 11 Wall 172, 20 L. Ed. 179; *Indianapolis* v. *Chase National Bank* (1941), 314 U.S. 63, 86 L. Ed. 47, 62 S. Ct. 15.

In the same chapter on page 13, Mr. Fins states as follows:

> "The court will scrutinize the case to determine whether there really is diversity of citizenship, and in order to do so will disregard the position in which the plaintiff has

placed the parties. And if it determines that a party who should have been a plaintiff was placed as a defendant, or vice versa, the court will realign the parties, and if after such realignment there is no diversity of citizenship, the cause will be dismissed for want of jurisdiction. This is known as the doctrine of realignment. (Citing *Indianapolis* v. *Chase National Bank* (1941), 314 U.S. 63, 86 L. Ed. 47, 62 S. Ct. 15)."

The Judiciary Act now has codified a number of these points; 28 USCA, paragraph 1359, provides:

> "A District Court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

The Judiciary Act, Title 28, USCA, Paragraph 1335, provides as follows:

> "Paragraph 1335(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm or corporation * * * having in his or its custody or possession money or property of the value of $500.00 or more * * * if (1) Two or more adverse claimants, of diverse citizenship as defined by section 1332 of this title * * * are claiming or may claim to be entitled to such money * * *; and if (2) the plaintiff has deposited such money or property * * * into the registry of the court * * *"

It will thus be seen that the claimants must be of diverse citizenship, and that the citizenship of the interpleader is immaterial to jurisdiction.

Such realignment reveals that parties from Illinois are on both sides of the controversy. When that is true, this Court has no jurisdiction. All of the claimants on one side of the controversy must be diverse from all claimants on the other side of the controversy. The Michigan and Illinois claimants on the coal company side of the controversy, in the

words of Justice Frankfurter, "are colloquially speaking, partners in litigation." *Indianapolis v. Chase National Bank* (1941), 314 U.S. 63, 86 L. Ed. 47, 62 S. Ct. 15. There being Illinois citizens on both sides of the controversy, jurisdiction is defeated. The interpleader is not a "claimant" in any sense of the word, and has no interest, other than as stakeholder, in the controversy.

The Court of Appeals, in order to sustain jurisdiction, believes "that Sohio's interest was more than that of a mere stakeholder." This is in spite of the Donk, et al. insistence on page 33 of their brief that Sohio was "but a stakeholder." The Court of Appeals recites a number of reasons for that belief. All are common to interpleading stakeholders, viz. "protection from multiple suits," "potential liability as a tort feasor," and "validity of its purchase agreements with one of the groups of adverse claimants."

The Court then states, "Necessarily, it was interested vitally in the identity of future recipients of royalties and in the ownership of the oil. This *interest* of Sohio is sufficient to give it standing * * *" (emphasis by Court). The important point is that there must be diversity between "claimants." Sohio is in no sense a "claimant" of the land or any of the proceeds from the sale of oil. Its only interest is to dispose of all of the proceeds to claimants designated by the court, and for that purpose to have the court adjudicate the title to the real estate.

The Court of Appeals in its opinion cites *Haynes v. Felder*, 239 F. 2d 868, 5th Cir. 1957, as authority for the holding that "it is sufficient if two adverse claimants with genuinely adverse interests are citizens of different states"—even though more than one may be from the same state. That citation stands practically alone, and is directly contrary to the Supreme Court of the United States and the great weight of authority.

Indianapolis v. *Chase National Bank* (1941), 314 U.S. 63, 86 L. Ed. 47; *Treinies* v. *Sunshine Mining Co.* (1939), 308 U.S. 66, 80 S. Ct. 44, 84 L. Ed. 85; Federal Jurisdiction and Procedure, Harry G. Fins (1960), Ch. II, pp. 6, 13. It follows some of the arguments used prior to the 1948 revision of the Judiciary Act, by which revision the Judiciary Act and the Interpleader Act were brought together. *Haynes* v. *Felder* leans heavily on pre-1948 Act articles and texts. Chafee, The Federal Interpleader Act of 1936, 49 Yale L. J. 377, 395 and 3 Moore 22.09. In the first part of the citation (p. 870) it correctly states that "it is clear that such a proceeding could not be brought as a diversity action under 28 U.S.C.A. (1332 * * * it has consistently been held that the law requires that each party have such citizenship that he could sue in diversity every other actual or indispensable party properly aligned against him. *City of Indianapolis* v. *Chase National Bank*, 314 U.S. 63, 62 S. Ct. 15, 86 L. Ed. 47, and this requirement has been held applicable to non-statutory interpleader."

Then in the latter part of the citation the Court appears to have determined to take a liberal attitude in order to retain jurisdiction. It seems to say that the statutes do not allow jurisdiction but somehow the Constitution, Art. III, §2, should. It argues for "partial diversity," "permissible incomplete diversity," "minimal diversity" and "this rationale," and makes the following utterly chaotic jurisdictional conclusion (p. 870):

> "Granted that the cases and text writers have rejected as inapplicable to statutory interpleader suits the 'complete diversity' rule, it still must be agreed, we think, that it is not easy to determine precisely how 'incomplete' a diversity among claimants has actually been sanctioned by the cases. This problem arises from the fact that though the courts and the text writers have stated that complete diversity would not be required they have not specifically catalogued and dealt with each of the several possible forms of incomplete diversity."

Again citing "Professor Chafee" the Court says, "jurisdictional requirements should be liberally interpreted to permit the federal courts to handle as many as possible of the cases that state courts may be unable to adjudicate completely." That is directly contrary to the fundamental law that federal courts are of strictly limited jurisdiction. Otherwise they would be overrun with litigation. Furthermore, the record in the present case shows conclusively that there is no possible reason why the state court of the situs of the land, the title of which is being adjudicated, would not be as able as the federal court of the Eastern District of Illinois to "adjudicate completely" the controversy. The forum was a matter of choice and not necessity. All parties were readily amenable to a court of the situs of the land.

The Court of Appeals also cites *Guth* v. *Texas Co.*, 155 F. 2d 563, 566 (7th Cir.) 1946, which was not an interpleader action, and reasons that the several holders of shares in the Donk, et al. lease could sue separately for their shares of the royalty payments, and that that somehow makes complete diversity unnecessary.

A reading of that citation clearly shows that it is not relevant to the present case. It is neither an interpleader nor one involving diversity. The complaint in that case, after repeated amendments, "stated one cause for relief for negligence and one on account" for oil and gas that were burned and wasted. The appeals court "agreed with the District Court that the cause of action asserted for negligence by the plaintiff was joint with other covenants and could not be maintained by the plaintiff alone." But it did not "think the District Court should have ignored the allegations * * * on account for gas, gasoline * * * (and that it) was a several obligation and the plaintiff could sue separately for his proportion of the royalty." Kline, et al. urge that it is immaterial whether or not

the various holders of royalty interests in the Donk, et al. lease could sue separately. The important question is on which side of the controversy are they? When Illinois citizens are on both sides of the controversy, jurisdiction is defeated.

B. THE SUIT IS SPECIFICALLY AND NECESSARILY AN ATTEMPT TO ADJUDICATE THE TITLE TO REAL ESTATE OUTSIDE THE JURISDICTION OF THE TRIAL COURT.

The distinction between local and transitory actions is as old as actions themselves. No one has ever supposed that laws which prescribe generally where one should be sued included such suits as are local in their character, either by statute or by common law, unless it was expressly so declared. Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated. *Casey v. Adams* (1880), 102 U.S. 66.

A leasehold interest to minerals in place is a title to realty, and suits involving the title to real estate must be tried in the district in which the land is located. The jurisdiction of the district court is coextensive with the boundaries of the judicial district and extends no further, save as congress has expressly extended it. An action to quiet title, to remedy or remove a cloud on the title, is local in character. It must be filed in the district where the land is situated. *Robinson v. Seater Oil Co.* (1944), 57 F. Supp. 581; *Tuler v. Stanolind Oil and Gas Co.* (1935), 77 F. 2d 802; *Primos Chemical Co. v. Fulton Steel Corp.* (1918), 254 F. 454; *Reconstruction Finance Corp. v. Maley* (1942), 125 F. 2d 131; *Webber Show Case and Fixture Co. v. Waugh* (1930), 42 F. 2d 515. The jurisdiction of the subject matter must arise from the law, and not merely by the consent of the parties. *Grubb v. Public Utilities Commission of Ohio* (1930), 281 U.S. 470, 50 S. Ct. 374, 74 L. Ed. 972; *Consolidated Companies, Inc. v. Martin* (1941), 39 F. Supp. 567.

The District Court's memorandum on jurisdiction cites *Hickok v. Gulf Oil Corp.* (1959), 265 F. 2d 798, as holding that the court's jurisdiction is not affected by the circumstance that the funds in the registry possess the legal character of proceeds derived from the sale of interests in realty, or by the fact that title to those funds is to be determined in accordance with the state law.

A reading of the case shows that it is not in point. An Ohio resident died in Ohio. His estate was pending there. He owned property in Ohio and an oil interest in Texas. There was domiciliary probate in Ohio. Also pending in a Texas court was a suit "seeking determination of rights in, and accounting as to, the properties comprising the Hickok Estate in Texas * * * The precise question at bar is whether the (Ohio) Federal Court has abused discretion in deferring adjudication of the right of the interpleading claimants to the fund pending final determination of the action in Texas." The Texas law also says that the "royalty involved here is real property, and interest in the mineral in place prior to extraction from the land * * * and it has long been settled that the law of the state in which the property is situated governs the devise of an interest therein." The Ohio court having jurisdiction for other reasons, dissolved the restraining order and stayed proceedings "until final determination of the cause in Texas."

At page 802 the Court held:

> "The district judge did not abuse his discretion in dissolving the temporary injunction * * * thus they were free to litigate their respective claims to the various Texas properties and the accounting problems between themselves as well. It may fairly be expected that the parties will return to the prosecution of their claims in the interpleader suit (in Ohio) not only with an adjudication of their respective interests, but also with some up-to-date settlement of accounts as between them."

It is apparent that the Ohio Court refused to adjudicate the title to the part of the property in Texas, and refused to dispose of the fund.

Potomac Milling and Ice Co. v. Baltimore and Ohio R.R. Co. (1914), 217 F. 665, involved a claim for fire damage to real estate caused by sparks from the railroad. The suit was filed in the Federal court of Maryland. The defendant pleaded that the land in question is in West Virginia and that, therefore, the Court had no jurisdiction. It contended that a suit for injury to real property is purely a local action and cannot be maintained outside the situs of the real estate. That contention was upheld. The Court held:

> "The unerring test by which it may be determined whether a particular cause of action sounding in damages is local or transitory is that if the subject of the injury be real estate or an easement * * * obviously the action must be local, for the reason that injury to that particular real estate or easement could not possibly have arisen anywhere else than where the thing injured was actually situated. But if the subject of the injury be an individual, then an injury to that individual's person, no matter by what means occasioned or where afflicted, it is essentially an injury to a subject not having a fixed * * * immovable location. In the courts of Maryland a suit for damages to real estate caused by fire negligently communicated to improvements thereon is local. (Quoting Chief Justice Marshall of the United States Supreme Court:) 'Actions are deemed transitory where the transactions on which they are founded might have taken place anywhere, but are local when their cause is in its nature necessarily local. It would require a hardihood which I do not possess to pass this limit.'"

In the present case, the transaction took place on the Bond County land, in the Southern District of Illinois. From that land the plaintiffs "have been and are now producing and marketing oil * * *" according to the original complaint

(App. 16). Sohio in its answer (App. 18) "admits that it has purchased oil from the property involved * * *" In Sohio's counterclaim for interpleader (App. 19) it states that "it has purchased oil from the property referred to in paragraph 2 of the complaint, described as the SE¼ SE¼, Section 29, T6N; R4W, Bond County, Illinois * * *".

The District Court also cited *Blackhurst v. James*, (1922), 304 Ill. 586, 593, but failed to refer to the essential difference between that case and the present one. In that case it was contended that "because the lands described in the deeds were in McDonough and Henderson Counties (as well as Hancock County), the Circuit Court of Hancock County had no jurisdiction of the subject matter. Section 3 of the Chancery Act provides that suits in chancery which may affect real estate shall be brought in the county where the same or some part thereof is situated." Of course the court held it had jurisdiction. A part of the land was in the county where the court sat, as required by the statute then and now.

The District Court cites Chapter 110, Illinois Revised Statutes, Section 7. That Court makes a point of the word "venue" in the heading, and contends that makes the question one of venue and not jurisdiction. It contends that any objection to venue was waived by the parties. The heading was supplied by the compiler of the statute and is not a part of the title or contents of the Act. *People v. Flaherty* (1947), 396 Ill. 304, 71 N.E. 2d 779.

The relevant portions of the statute read as follows:

> "7. Venue—Public Corporations—Local Actions—Libel—Insurance Companies. §7(1) * * *
>
> (2) Any action to quiet title to real estate, or to partition or recover possession thereof, or to foreclose a mortgage or other lien thereon, must be brought

in the county in which the real estate or some part of it is situated."

It seems apparent from the plain wording that this section is far more than a venue matter, and that it cannot be waived by mere consent of the parties or failure to raise the question. The Act places all three remedies in the same statute. The principles applicable to one apply to all three. No one could contend that as to partition and foreclosure the Act is a venue matter subject to waiver and consent of the parties. If the Act is jurisdictional as to partition and foreclosure, it is necessarily so as to actions to quiet title; if it is "must" as to partition and foreclosure, it is "must" as to actions to quiet title. It is important to note that the word "must" prior to amendment read "shall." If one assumes that it is a venue matter and subject to waiver, could it be reasoned that by consent of the parties a Cook County, Illinois court could partition land solely in Bond County, or that an Illinois district court for the Eastern District of Illinois could quiet title of, partition, or foreclose a mortgage on, property solely in the State of California, or even in the Southern District of Illinois?

Similarly, could it be that by consent of the parties this Court could quiet title to real estate solely in any one of the other 49 states, or real estate solely in the City of Chicago in Cook County in the Northern District, or as in this case, solely in Bond County in the Southern District? No doubt there are cases of improper venue which can be waived by the parties, but the quieting of title must be a jurisdictional matter. In both the federal and state courts, local actions involving titles to real estate must be brought in the district or county in which at lea. a part of the property is located. 28 U.S.C.A. 1392, 1655; Ill. Rev. Stat., Ch. 110, Sec. 7. Any other decision would be chaotic.

If every county in every state and every federal district court in every district could adjudicate titles to real estate solely in other counties or districts in the United States, no title would be secure. If the contention is proper that where the Court has jurisdiction of the parties it may act in personum and compel the parties to execute the necessary instruments, then, any case involving a title to real estate, wherever located, could be decided by the Court having jurisdiction of the parties. Could it be successfully reasoned that a district court could effect the foreclosure of a mortgage by deciding that the mortgagor could not pay the mortgage and order him to convey the property to the mortgagee? Could a district court similarly effect a partition of real estate aaywhere in the country, or even in another district in Illinois, by compelling the parties to execute the necessary deeds? Similarly, in an action to quiet title, or remove a cloud or construe or reform a deed, could the court decide the case, as in this instance, by merely deciding who owned the property, and who is entitled to the oil proceeds, regardless of where the land is located? If that were the law, what title security would a subsequent owner have if he would be required to check the actions of all the courts in the country to see how they had construed the title to his property?

The District Court in its opinion also cited *Bevan v. Murray* (1911), 251 Ill. 603, 96 N.E. 546. That case concerned the estate of a Cook County, Illinois, resident. She died owning a number of properties in Cook County and some in Indiana. Her husband, the executor, executed certain deeds of this property to his son-in-law. It was contended that he exceeded his authority. The suit was a bill in equity to set aside certain deeds to the property, including that in Indiana. The trial court ordered

re-conveyance of the Indiana property. The Supreme Court in a four-to-three decision upheld that part of the decree. The decision is based on the ruling in a very early United States Supreme Court case that "when the defendant is liable, either in consequence of a contract or as trustee or as holder of a legal title acquired by a species of mala fides practiced on the plaintiff" the court may act on the person. The court then negatives the value of its decision by saying that "the interpretation, as well as the force and effect to be given the will of Mary M. Champlin, as well as all other transactions affecting the title of the Indiana real estate, may ultimately become a question to be determined by the courts of that state." The three-judge dissenting opinion strongly disagrees with the majority holding.

The trial court in its opinion citing the above case of *Bevans* v. *Murray* (1911), 251 Ill. 603, 96 N.E. 546, states the question there was "somewhat akin to the question here presented." Kline, et al. believe that case is not in point with the present action. The key to the upholding of jurisdiction in the *Bevans* case was that "when the defendant is liable, either in consequence of a contract or as trustee or as a holder of legal title acquired by a species of mala fides practiced on the plaintiff," the court may act on the person of the defendant. It might be that a person who contracts to give a deed may be followed to another jurisdiction and compelled to execute the deed called for by the contract. Similarly, it might be that a dishonest trustee who absconds, or a person who, after a species of mala fides leaves the jurisdiction, may be pursued. Such situations are far removed from the present action seeking to quiet the title to, or remove a cloud on, the Kline land, or construe the various deeds, leases and

assignments, or reform, if necessary, the Samuel Brown Warranty Deed to Coal and Mining Rights. Surely the gate is not thrown wide for the Court to effect the construction of an ambiguous deed, or the reformation of a mistakenly written deed, merely by acting on the person of the parties and ordering them to execute certain deeds, releases, etc. Of what effect in the foreign jurisdiction is the trial court's judgment or decree in this case construing the title in favor of Bonk, et al. Kling, et al. believe it is of no effect.

C. THE DEPOSIT WITH THE COURT BY THE INTERPLEADER DOES NOT PLACE JURISDICTION IN THE COURT WHERE IT WOULD OTHERWISE LACK JURISDICTION. JURISDICTION DETERMINES DEPOSIT. DEPOSIT DOES NOT DETERMINE JURISDICTION

The District Court in its opinion also says, "It cannot be disputed that this Court has jurisdiction over the proceeds of the funds deposited in this Court." This clearly is in error. It is obvious that Sohio deposited the funds with the Court. But that does not give it jurisdiction.

> "In an interpleader action jurisdiction determines deposit, not deposit jurisdiction. It would be more than mere novelty to hold that, the Court otherwise lacking jurisdiction, the interpleader would confer jurisdiction on the Court to determine his true obligation, in the face of antagonistic claims, merely by depositing the amount of its admitted liability with the Court. Under that theory the interpleader could confer jurisdiction on any court by depositing the fund in that court, and in such event the statute would be entirely useless and unnecessary. The truth is that unless the Court regards ample jurisdiction in the premises, there is no fund in the sense in which that word is used." *Mutual Life Ins. Co. v. Lott* (1921, D.C.) 275 F. 365, 372.

It also must be borne in mind that if the trial court in the present action is correct in holding that the action is transitory and not local, then jurisdiction must be based on some other ground. Since (1) the land is not within the jurisdiction of the Court, and (2) the Court does not have jurisdiction of the parties due to lack of diversity of citizenship, and (3) the deposit of the funds does not confer jurisdiction, then the Court has no jurisdiction to decide any transitory question.

II.

THE DECISIONS ON THE MERITS BY THE DISTRICT COURT AND THE COURT OF APPEALS WERE CONTRARY TO ALL OF THE EVIDENCE AND THE LAW OF ILLINOIS AND THE WEIGHT OF AUTHORITY GENERALLY. THOSE DECISIONS, APPELLANTS BELIEVE, MAKE A TRAVESTY OF JUSTICE IN A COURT OF EQUITY.

The "Warranty Deed to Coal and Mining Rights," except for the words "and other mineral" in the printed form, is plainly a conveyance only of coal. It is entitled in large block lettering, "Warranty Deed to Coal and Mining Rights." It specifically limits the conveyance to "under the surface," "together with the right to conduct mining operations under the surface." It refers to "rooms, entries and mining ways at coal depth under the surface * * * as and for mining ways, to and from beds of coal or other mineral in other lands." (N.B. Not mining ways, to and from beds of coal in other lands, but to and from beds of coal or other mineral in other lands.)

The words "at coal depth" were interlined by typewriter in the printed form. There must have been at the time an obvious and reasonable purpose in the minds of the parties. It is noted that in many other deeds using the same

printed form, to the same grantee, prepared by the same coal company attorney, notarized by the same notary, and part of the same series of purchases, the words "at coal depth" were not interlined. But other interlineations were used in lieu thereof, e.g. "except oil and gas" and variations having the same meaning. There was an obvious pattern of having one or another of those interlineations, but not both. Unless the words "at coal depth" were intended to denote the same limitation as "except oil and gas," they would serve no purpose. There would be no logical purpose in specifically limiting mining ways and rooms to coal depth: that is the only place mining ways and rooms would be under any circumstances. If there was any good reason related only to coal for inserting those interlined words "at coal depth," that reason would have been equally good for all deeds.

The only way the deeds can include oil and gas is to conclude that the parties intended the words "other mineral" to include oil and gas. The deeds speak of the "right to mine and remove said coal and other mineral and the right to conduct mining operations under the surface of said tracts of land therefor," and of "mining ways to and from beds of coal or other mineral in other lands." One does not "mine" oil and gas, or "conduct mining operations under the surface" for oil and gas. One never speaks of "beds" of oil and gas. The words "other mineral" appear specifically three times, and a fourth time as "therefor." It would be unreasonable to argue that one reference to "other mineral" includes oil and gas, but other references in the same deed do not. The test is the intention of the parties. It is nothing short of ridiculous to argue that the parties intended to include oil and gas.

Donk, et al. introduced no evidence whatever bearing on the intention of the parties. They introduced other deeds and leases and rested their case. On the other hand, Kline, et al. introduced a great amount of direct evidence.

William Ganzer, the aged agent of the coal interests and solicitor of the coal rights from the farmers testified. His testimony was uncontradicted that only coal rights were purchased and intended to be purchased. He actually went to the home of the grantor and purchased the options.

Mr. Ganzer testified that subsequent to the conveyances he had a conversation with Rassieur, since deceased. Objection to the testimony was sustained. An offer of proof was made that, if permitted to testify, he would say that he had made a special trip to St. Louis to ask Rassieur what he intended by the words "other mineral" in the deeds; that Rassieur replied to the effect that coal and other mineral necessarily mined with coal, and not oil and gas, were intended and purchased, and that he, Rassieur, would so testify if requested. The brief of Kline et al. clearly shows that the objection should have been overruled and the testimony admitted.

The printed form of "Notice of Acceptance of Coal Rights Under Option" used in all cases prior to execution of the deed was introduced in evidence. It does not speak of either oil and gas or other mineral.

The records of the coal company were subpoenaed into court. This included many letters and documents over the signature of Theodore Rassieur, the grantee attorney for the coal company. They specifically referred to the land in question, and all of the properties in the field. All showed conclusively that only coal rights were bought or intended

to be bought. There was not even a suggestion that oil and gas were included or intended to be included.

The words "other mineral" as used in this Warranty Deed to Coal and Mining Rights, and under the circumstances, are ambiguous. The adoption of arbitrary definitions in reference to mineral substance buried in the earth is not permissible. The word "mineral" standing by itself, might, under a broad, general, popular definition, embrace the soil and all that is to be found beneath its surface; under a strict definition coupling it with mines, it covers all substances taken out of the bowels of the earth by the process of mining. With reference to the scientific definition of minerals and the popular understanding of what constitutes minerals, it is necessary, if possible, in construing grants, to ascertain the intention of the parties. It is necessary that each case be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor if it can be ascertained. The word "minerals" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its significance in a give case. The most reasonable rule is that each case must be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor, if it can be ascertained. This is the "reasonable rule, and it is supported by an abundance of authority."

The primary purpose of construction of a deed is to ascertain the intention of the parties, to be determined and gathered from the instrument as a whole, giving effect to every word and rejecting none as meaningless or repugnant, if this can be done without violating some positive rule of law. The words need not be construed literally or

strictly, since greater regard is accorded to the real intention as manifested in the entire deed than to any particular word or arrangement in its expression. *Kinder* v. *LaSalle County Coal Co.* (1923), 310 Ill. 126, 132, 141 N.E. 537; *Miller* v. *Ridgley* (1954), 2 Ill. 2d 223, 117 N.E. 2d 759, 760; *Texas Co.* v. *O'Meara* (1941), 377 Ill. 144, 36 N.E. 2d 256; *Magnolia Petroleum Co.* v. *West* (1940), 374 Ill. 516, 30 N.E. 2d 24, 26; *Bear* v. *Millikin Trust Co.* (1929), 336 Ill. 366, 381, 168 N.E. 349; *Nance* v. *Donk* (1958), 13 Ill. 2d 399, 151 N.E. 2d 97 (Opinion of the Court); Hardin, Transfer of Mineral and Royalty Interest, Grant or Reservation of Coal and Other Minerals (1959), No. 2 U. of Ill. Law Forum 507, 518.

The word "mine" is indicative of the intention that the right to drill was not reserved. It is a matter of common knowledge that coal can be removed from the ground by lateral mining operations which will not disturb the surface. Coal operators mine tracts consisting of hundreds of acres of coal by means of underground galleries and in many instances the coal is sold independent of the surface, which allows such operators to mine it. *Rhomberg* v. *Texas Co.* (1942), 379 Ill. 430, 40 N.E. 2d 526, 529.

This is also the law in Indiana and Ohio. *Monon Coal Co.* v. *Riggs* (1944), 56 N.E. 2d 672, 57 N.E. 2d 598; *Jividen* v. *New Pittsburg Oil Co.* (1933), 45 Ohio App. 294, 187 N.E. 124.

The Pennsylvania courts, probably the most experienced in oil and gas law, go further and hold that "there is a rebuttable presumption that the word mineral when used in a deed, reservation or exception does not include oil or natural gas." *Dunham* v. *Kirkpatrick* (1882), 101 Pa. 36, 47 Am. Rep. 696; *Silver* v. *Bush* (1906), 213 Pa. 195,

62 A. 832; *Preston* v. *South Penn. Oil Co.* (1913), 238 Pa. 301, 86 A. 203; *Bundy* v. *Myers* (1953), 372 Pa. 583, 94 A. 2d 724.

Where words of inheritance are not used, the rule is that every word used in the conveyance, irrespective of where it may be found, shall be given weight in construing the instrument. Although defendants seek to caption the quoted statement an habendum clause, it is in reality, a part of the granting clause. The habendum clause is the "to have and to hold" clause. There is none in this deed. The old decisions making a distinction based on the location in a deed of particular wording are no longer followed by the Supreme Court of Illinois. In construing a deed all of its parts should be considered and harmonized, if possible. Since it cannot be presumed that words or terms in a conveyance were employed without a meaning, or having some effect accorded them, a construction will be adopted, if legally permissible, giving effect not only to the instrument as a whole, but to each word and term used, rejecting none as meaningless, repugnant or surplusage. The circumstances attending the transaction, the situation of the parties, the objects which they had in mind, as shown by the deed, as well as those they did not have in mind and could not attain, merit consideration in construing deeds. *Smith* v. *Grubb* (1949), 402 Ill. 451, 84 N.E. 2d 421, 425; *Magnolia Petroleum Co.* v. *West* (1940), 374 Ill. 516, 30 N.E. 2d 24, 26; *Bear* v. *Millikin Trust Co.* (1929), 336 Ill. 366, 381, 168 N.E. 349; *Rhomberg* v. *Texas Co.* (1942), 379 Ill. 430, 40 N.E. 2d 526, 529; *Texas Co.* v. *O'Meara* (1941), 377 Ill. 144, 36 N.E. 2d 256; *Kinder* v. *LaSalle County Coal Co.* (1923), 310 Ill. 126, 132, 141 N.E. 537.

Equity may reform a written instrument failing to express agreement made or intended by parties through mutual mistake, either of law or of fact, or mistake of one accompanied by the fraudulent knowledge and procurement of other parties. *Darst* v. *Lang* (1937), 367 Ill. 119, 10 N.E. 2d 659, 661; *McCall* v. *Middleton* (1922), 304 Ill. 408, 412, 136 N.E. 723; *Dill* v. *Widman* (1953), 413 Ill. 448, 109 N.E. 2d 765, 769; *Dazey* v. *Binkley* (1918), 285 Ill. 513, 522, 121 N.E. 165; Hermann, Reformation and Rescission (1960), No. 1, U. of Ill. Law Forum 1.

If there is any inconsistency in the instrument between the printed form and the typewritten words "at coal depth," the typewritten words will be controlling as showing the real intent of the parties. *Haughn* v. *Haughn* (1921), 296 Ill. 305, 308, 129 N.E. 807.

The right to ingress and egress, and the right to use the surface of the land, which may be implied from a specific grant of oil and gas, will not be implied against language in the deed which is inconsistent with, or contrary to, such rights. The Warranty Deeds to Coal and Mining Rights do not convey surface rights for any purpose. The result is that no oil and gas rights were conveyed nor intended to be conveyed. The conveyance was limited to coal and other minerals recovered at coal depth by means of underground passageways from other lands. Ambiguities in the deed should be resolved against the grantee because the grantee drew the deed and approved it as drawn. *Chicago, Wilmington & Franklin Coal Co.* v. *Miner* (1942), 127 F. 2d 1006; *Kigler* v. *LaSalle County Coal Co.* (1923), 310 Ill. 126, 135, 141 N.E. 537.

The District Court's memorandum on the merits and Donk, et al. quote the so-called "concurring opinions" in

Nance v. Donk (1958), 13 Ill. 2d 399, 151 N.E. 2d 97. They ignore the Opinion of the Court and the great many unanimous opinions of the Supreme Court of Illinois. Those "concurring opinions" are more in the nature of dissenting opinions. They were added under the pressure of belated petitions by the Illinois Oil and Gas Association for rehearing, and without further hearing being granted.

It must be noted that the decision was not on the merits but on the sufficiency of the complaint. It was upheld.

The opinion as originally given was unanimous except for the notation at the close that Mr. Justice House dissented. Subsequently, the Illinois Oil and Gas Association, as amicus curiae, intervened with a motion for rehearing. The opinion was modified slightly upon denial of petition for rehearing. The first sentence of the fourth paragraph was stricken, viz., "Before we consider the merits of the complaint, it is necessary to dispose of a matter of form that defendant urges." The second sentence of the next to the last paragraph was modified from "The complaint alleges * * *" to "Count 5 alleges * * *" The last sentence of the same paragraph was changed from "In our opinion these facts, if proved, would entitle the plaintiffs to the relief they seek" to "In our opinion these allegations are sufficient to require an answer." Mr. Justice House withdrew his dissent and the concurring opinions were added. The "concurring opinions" oppose construction but agree that reformation of the Warranty Deed to Coal and Mining Rights is called for. They otherwise appear to be more in the nature of dissenting opinions. Their opposition to construction is difficult, if not impossible, to rationalize in the light of the well settled and clearly stated law of Illinois in prior decisions and in the Opinion of the Court in that case and even in the citations referred to

by those "concurring opinions." They are so obviously in error in so many respects that they are of no value. If they correctly state the law in Illinois, it would be a radical departure from precedent in Illinois, and the weight of authority elsewhere.

Particular attention is called to the relevant wording of the Opinion of the Court. The *Nance* case involved a Warranty Deed to Coal and Mining Rights identical with the present one. The Opinion of the Court recites the allegations of the complaint, viz.

> Theodore Rassieur, the grantee in that deed (and the present one) was a principal shareholder and director of Donk Bros. From 1907 to 1911 and thereafter Rassieur and other agents of the company solicited options for coal rights in two townships in Bond County. The agents represented to the owners in the vicinity that only coal was desired, and the right to remove it by means of underground passageways. The various deeds resulted. In order to make definite the intention of the parties that no surface rights or anything below coal depth were being conveyed, the words "at coal depth" were interlined in the original deeds. The grantors did not intend to sell or the grantees to buy the oil and gas underlying or the right to drill for and recover it. The deeds to the coal rights were prepared by the grantee. The grantors intended to convey and the grantees to acquire, only the coal and such mineral substances as formed a part of, or were found lying with, the coal in place.
>
> In construing deeds we start with the proposition that the purpose of construction is, of course, to arrive at the intention of the parties. To that end all of the words used in the conveyance are to be taken into account, and effect is to be given to the instrument as a whole. Under these circumstances the relevant background facts become important. From what has

> been said it follows that the decree of the Circuit Court of Bond County must be reversed and the cause remanded with direction to overrule the motion to dismiss.

In the face of the Opinion of the Court and the obvious errors of the "concurring opinions, it is beyond comprehension how the District Court in its memorandum on the merits of the present case could hold for Donk, et al. and say that, "the ghosts of the past that have long haunted the courts in the State of Illinois, when they were faced with the term coal and other mineral was laid to rest by the Illinois State Supreme Court in the case of *Nance v. Donk Bros. Coal and Coke Company.*".

Certainly, if ghosts of right and equity were laid to rest, it was in a shallow grave. The Illinois Supreme Court has consistently held that each case must be decided upon the language of the grant, the surrounding circumstances, and the intention of the parties. "The adoption of arbitrary definitions in reference to mineral substances buried in the earth is not permissible * * * The word minerals is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its significance in a given case * * * The most reasonable rule is that each case must be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor, if it can be ascertained * * *" *Kinder v. LaSalle County Coal Co.* (1923), 310 Ill. 126, 132, 141 N.E. 537. Those statements are repeated over and over in the many decisions cited. If they are the ghosts to be laid to rest, they will, like Banquo's ghost, rise again and again to haunt the rapacious schemes of such as Donk, et al. Right and equity must prevail.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted for the following reasons: The Court of Appeals has 1) decided an important question of local law in a way probably in conflict with applicable local decisions; 2) decided an important question of federal law which has not been, but should be, settled by this Court; 3) decided a federal question in a way probably in conflict with applicable decisions of this Court; and 4) has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision; all as provided by Rule 38, Section 5(b) of the Supreme Court.

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS ON JURISDICTION

Stewart Oil Company, a corporation; Michigan Oil Company, a corporation Stewart Producers, Inc., a corporation; Kenneth Patterson; G. F. Stewart; W. Rolland Stewart; Frank J. Tiernan; and Morris Yarbrove, Plaintiffs.

v.

Sohio Petroleum Company, a corporation,
Defendant and Counterclaimant.

v.

Walter E. Kline, Stella P. Kline, R. E. Hayes, Carl E. Moses, David R. Stewart, W. T. Frederking, A. P. Wagemann, John J. Steiner, Josephine M. Steiner, and Donk Bros. Coal and Coke Company, Counterdefendants.

Civ. A. No. 3821

United States District Court
E. D. Illinois

Aug. 3, 1960

JUERGENS, District Judge.

Plaintiffs filed suit demanding proceeds from the sale of oil produced from lands to which they claim oil and gas rights. The original defendant filed an interpleader action because of disputed claims to the proceeds between the plaintiffs and other parties.

The original defendant has tendered $100,156.04 to the Clerk of this Court, alleging possession but not legal ownership

thereof, and asks the Court to determine the party or parties entitled thereto.

The interpleader action prays the determination of ownership not only as to the funds paid into court but also ownership to proceeds from the sale of oil and gas to be produced from the disputed lands in the future.

Counterclaimants have been brought into the action and have filed claims to the funds presently in the court and funds which may accrue in the future.

The interpleaded funds are proceeds of oil produced and marketed by plaintiffs from land lying outside the Eastern District of Illinois in Bond County, Illinois.

On the eve of trial the counterdefendants, Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking, and A. P. Wagemann, filed their motion to dismiss for the following reasons:

1. That the Court lacks jurisdiction of the persons and subject matter in this action because the principal question involved is a local action to try title of land lying outside the territorial limits and jurisdiction of this Court.

2. That there is not proper diversity of citizenship between the parties.

3. That there is an action awaiting trial in the Circuit Court of Bond County, Illinois, which involves substantially identical issues as this case.

[1] An examination of the pleadings discloses that the action awaiting trial in Bond County, Illinois, does not involve the title to the land here in dispute nor the parties in this action. Accordingly, the reason for dismissal set forth in number 3 above is without merit.

(Opinion of the U. S. District Court on Jurisdiction)

The brief of counterdefendants, Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking, and A. P. Wagemann, asserts that this Court does in fact have jurisdiction over the interpleader action, thereby apparently waiving the grounds in support of their dismissal as set forth in paragraph numbered 2 above. Notwithstanding this apparent waiver, the Court finds that diversity of citizenship exists.

The assertion that this Court lacks jurisdiction of the subject matter because the principal question involved is a local action to try title to land lying outside the territorial limits and jurisdiction of this Court will next be considered.

[2, 3] Whatever may be the extent of the jurisdiction of the lower federal courts over the subject matter of a suit with respect to persons and property, it is, in the absence of express authority by act of congress, confined to the territorial limits of the district within which the court sits. Accordingly, although a lower federal court may in the exercise of its equity powers, and acting in personam, control the acts of persons over whom it has acquired jurisdiction, outside of its territorial jurisdiction, as for instance by compelling a conveyance of lands in another state by a decree in personam against the party who holds the title, it has no jurisdiction to transfer the title to such lands by a sale and conveyance made through its master or commissioner. 35 C.J.S. Federal Courts § 16, p. 811.

[4] Here there can be no question as to the federal court's jurisdiction in the interpleader action or as to this Court's actual possession of the property with respect to which it is called upon to adjudicate title, namely, the proceeds of the royalty payments deposited in the registry. The Court's jurisdiction is not affected by the circumstance that the funds in the registry possess the legal character of proceeds derived

from the sale of interests in realty or by the fact that title to those funds is to be determined in accordance with the state law. *Hickok* v. *Gulf Oil Corporation*, 6 Cir., 1959, 265 F. 2d 798.

It cannot be successfully disputed that this Court has jurisdiction over the proceeds of the funds deposited in this Court. The only point upon which jurisdiction of this Court may be challenged is premised on the fact that the Court is asked to determine ownership of future funds which may be derived from the sale of oil and gas produced from land lying outside the territorial limits of the district.

It is counterclaimants' assertion that in this action the Court must determine title to lands lying outside the territorial limits of the district and therefore, the action is local and must be brought within the district where the land is located.

[5] Whether a cause of action involving land is local or transitory depends upon the law of the state wherein the land is situated. *Kentucky Coal Lands Co.* v. *Mineral Development Co.*, 6 Cir., 191 F. 899.

Section 7 of Chapter 110, Illinois, Revised Statutes, provides in pertinent parts as follows:

> "§7. Venue— • • •
>
> "(2) Any action to quiet title to real estate, or to partition or recover possession thereof or to foreclose a mortgage or other lien thereon, must be brought in the county in which the real estate or some part of it is situated."

[6] At the start of this action there may have been grave doubt as to whether this Court was the proper venue for this cause. When the defendants entered their unlimited appearance, any questions of venue which may have been raised were waived and consequently are not now open to consideration by the Court.

(Opinion of the U. S. District Court on Jurisdiction)

In *Berans* v. *Murray*, 251 Ill. 603, 96 N.E. 546, 554, the Illinois Supreme Court had before it a question somewhat akin to the question here presented, wherein it was asserted that the lower court lacked jurisdiction to enter a decree construing deeds to land, some of which was located in the State of Indiana. The Court quoted from *Enos* v. *Hunter*, 4 Gilman, Ill. 211, as follows:

> "'Where the relief sought could be effected by acting directly upon the person of the defendant, the court of chancery has never hesitated to entertain the bill where the defendant is found within its jurisdiction, whether the subject matter of the controversy be within its control or not. Of this character are those cases where the courts have compelled specific performances of contracts for the conveyance of or relating to land which is situate beyond its jurisdiction, and in such case the court will compel a conveyance to be executed in such manner and form as may be prescribed by the laws of the country where the land is situate. * * *'."

The court also quoted from *Massie* v. *Watts*, 6 Cranch 148, 3 L. Ed. 181, as follows:

> "'When the defendant is liable, either in consequence of a contract or as trustee or as holder of a legal title acquired by a species of mala fides practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found; and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest the jurisdiction. * * * In case of fraud, of trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person is found, although lands not within the jurisdiction may be affected by the decree.'"

The court further stated that the concluding part of the above citation is not to be understood as authorizing a court of equity in any case to render a decree directly affecting land in another jurisdiction. The court further stated that the decree in such cases settles the rights of the parties before the court with respect to some contract, conveyance, trust or fraudulent conduct, and by attachment or other coercive means compels the offending party to comply with the requirements of the decree or simply declares the transaction complained of void and thereby removes the obstruction to the enforcement of his legal remedies.

In *Blackhurst v. James*, 304 Ill. 586, 136 N.E. 754, the appellants contended that the suit, insofar as it was sought to set aside deeds affecting land in counties outside the jurisdiction of the trial court, was improper and that the decree setting aside and canceling such deeds was a decree in rem, not in personam, and was therefore void. The court held that the decree setting aside the deeds was not void on the ground that the court did not have jurisdiction of the subject matter and that the requirement of the law that suits affecting land shall be brought in the county where it or some part of it is situated was not violated by the decree setting aside the deeds.

[7] In their amended joint claim the counterdefendants, Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking, and A. P. Wagemann, assert that the oil and gas interest claimed by the plaintiffs was obtained through fraud or mistake by the plaintiffs' predecessors in title and ask for reformation of the deeds to properly reflect the interest which was intended to be conveyed. Thus, it appears that the claim of these counterdefendants is based on fraud or mistake and that any dispute which exists as concerns property rights to land

located outside the territorial limits of the district is founded on such fraud or mistake.

In accordance with the above authority, it appears that Illinois law has established that such a cause of action so asserted is an action in personam and therefore transitory and may be brought whatever the parties may be found.

The Court finds that the cause here asserted may be brought in this district notwithstanding it may affect title to lands lying ouside of this district.

This Court has jurisdiction to entertain the cause here asserted.

APPENDIX "B"

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS ON THE MERITS

Stewart Oil Company, a corporation; Michigan Oil Company, a corporation, Stewart Producers, Inc., a corporation; Kenneth Patterson; G. F. Stewart; W. Rolland Stewart; Frank J. Tiernan; and Morris Yarbrove, Plaintiffs,

v

Sohio Petroleum Company, a corporation,
Defendant and Counterclaimant,

v

Walter E. Kline, Stella P. Kline, R. E. Hayes, Carl E. Moses, David R. Stewart, W. T. Frederking, A. P. Wagemann, John J. Steiner, Josephine M. Steiner, and Donk Bros. Coal and Coke Company, Counterdefendants.

Civ. A. No. 3821

United States District Court
E. D. Illinois

March 23, 1962

Jennings, District Judge.

This action was commenced by the plaintiffs to recover the proceeds from the sale of oil produced from the Southeast Quarter of the Southeast Quarter of Section 29, Township 6 North, Range 4 West of the Third Principal Meridian, Bond County, Illinois, and sold to Sohio Petroleum Company, defendant. After the action was instituted, the defendant paid the funds received from the sale of the oil into the Registry of this

Court, alleging that there were adverse claims to the proceeds and that the defendant-counterclaimant was in doubt as to the person or persons entitled to said proceeds and that it could not safely determine as between the adverse claims without hazard to itself and asked that this Court determine to whom the proceeds should be paid. The defendant-counterclaimant, Sohio Petroleum Company, does not claim any part of the proceeds.

On October 24, 1957, this Court entered an interlocutory decree which provided that the amended counterclaim was in the nature of a bill of interpleader, that it was aptly filed, and that the Court has jurisdiction over the parties and the subject matter. The Sohio Petroleum Company was allowed to deposit the sum of money in dispute in the Registry of the Court, subject to further order of the Court. The Sohio Petroleum Company was released and discharged from any and all liability for the proceeds of the oil produced from the property from the first purchase until the first day of September, 1957. Additional funds have subsequently been deposited in the Registry of the Court to abide the result of the trial.

The counterdefendants, John J. Steiner and Josephine M. Steiner, having failed to plead or appear, were judged and ordered defaulted.

The plaintiffs and the counterdefendants, Donk Bros. Coal & Coke Company, Carl E. Moses and David R. Stewart, claim that they are entitled to the proceeds by virtue of an oil and gas lease dated October 21, 1955, from Donk Bros. Coal & Coke Company, lessor, to Carl E. Moses and David R. Stewart, lessees, and subsequently assigned to the plaintiffs subject to a royalty of 1/8 interest in the original lease reserved to Donk Bros. Coal & Coke Company and an overriding

royalty of 1/16 of 7/8 reserved to Carl E. Moses and 1/32 of 7/8 reserved to David R. Stewart.

Doink Bros. Coal & Coke Company acquired its interest in the property from one Theodore Rassieur, who had in turn acquired title from Samuel J. Brown by warranty deed dated September 21, 1907, which provides in pertinent parts as follows:

> "The Grantor Samuel J. Brown, (unmarried), of Town of Old Ripley, in the County of Bond and State of Illinois, for and in consideration of Other good and valuable considerations, and the sum of One Dollars Convey and Warrant to Theodore Rassieur, of St. Louis, Missouri, the following described real estate to-wit: All coal and other mineral under the surface of the following described tracts of land:
>
> • • • • •
>
> "The Southeast quarter (¼) of the Southeast quarter (¼) of Section No. Twenty-nine (29), in Township No. Six (6), North; Range No. Four (4), West of the Third (3rd) Principal Meridian, 40 acres; containing in all 143.55 acres, more or less, in Townships Nos. 5 & 6, North, Range No. Four (4), West of the Third Principal Meridian, in the County of Bond and State of Illinois, together with the right to mine and remove said coal and other mineral and the right to conduct mining operations under the surface of said tracts of land therefor, and the right to use all rooms, entries and mining ways at coal depth under the surface of said tracts of land as and for mining ways, to and from beds of coal or other mineral in other lands, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois.
>
> "Dated this 21st day of September, A. D. 1907.
>
> "/s/ Samuel J. Brown."

(Opinion of the U. S. District Court on the Merits)

The words "at coal depth" are added by interlineation to the printed deed.

The counterdefendants, Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann, claim the proceeds by virtue of mesne conveyances from Samuel J. Brown originating with a deed from Samuel J. Brown to Albert T. Brown dated the 21st day of September, 1907, which provides in pertinent parts as follows:

> "The Grantor, Samuel J. Brown, (unmarried), of the Town of Old Ripley, in the County of Bond and State of Illinois, for and in consideration of Other good and valuable considerations, and One Dollars in hand paid Convey And Warrant to Albert T. Brown, of the same place, in the County of Bond and State of Illinois, the following described Real Estate, to-wit:
>
> • • • • •
>
> "Also the Southeast quarter (¼) of the Southeast quarter (¼) of Section No. Twenty-nine (29), in Township No. Six (6) North; Range No. Four (4), West of the Third (3rd) Principal Meridian, 40 acres, more or less;
>
> "Containing in all 143.55 acres, more or less; (Coal etc. underlying said premises reserved, same having been heretofore sold); situated in the County of Bond, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State."
>
> "Dated this 21st day of September A.D. 1907.
>
> "/s/ Samuel J. Brown."

There is no dispute between the parties as to the title to the premises prior to Samuel J. Brown.

Donk Bros. Coal & Coke Company and those plaintiffs and counterdefendants claiming under it contend that the terms in

the deed from Samuel J. Brown to Donk Bros. Coal & Coke Company conveyed as a matter of law the oil and gas underlying said premises and that accordingly they are now entitled to the proceeds from the oil and gas which has been removed or which will be removed in the future.

The counterdefendants, Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Fresterking and A. P. Wagemann (hereinafter referred to as "Kline et al."), contend that the deed from Samuel J. Brown to Theodore Rassieur does not convey the oil and gas as a matter of law. They further contend that it was the intention of the parties that only the coal and the right to mine the coal beneath the surface of the ground was meant to be conveyed. They further assert that the deed from Samuel J. Brown to Theodore Rassieur is ambiguous and should be construed in order to conform to the intention of the parties. In the alternative, they argue that in the event it is found that the deed is not ambiguous, it should be reformed to comply with the intention of the parties.

[1] The ghosts of the past that have long haunted the courts in the State of Illinois, when they were faced with the term "coal and other mineral," were laid to rest by the Illinois State Supreme Court in the case of *Nance v. Donk Bros. Coal & Coke Company*, 13 Ill. 2d 309, 151 N.E. 2d 97 (1958). In that case Mr. Justice House, together with Justice Klingbiel in a concurring opinion, had the following to say:

> "The complaint specifically prays for a construction of the deeds to exclude a conveyance of the oil and gas. However, the allegations thereof do state a cause of action for deed reformation and plaintiffs have alternatively prayed for that relief. For the reasons hereinafter given, the reformation remedy is available to plaintiffs but not construction of the deeds.

(Opinion of the U. S. District Court on the Merits)

"We have long followed the universally accepted doctrine that where the language used in a deed has a settled legal meaning, the intention of the parties must be gathered from the instrument itself and extrinsic evidence is not admissible to aid in its construction. (Cases cited).

"In a series of Illinois decisions in the early 1940's, it was held, as in the majority of other jurisdictions, that a conveyance of 'a'll coal and other mineral' has a settled legal meaning and does include oil and gas, with incidental exploration, development and production rights. (Cases cited)."

Justice Bristow, together with Justice Daily in a special concurring opinion, had the following to say:

"Counts 1, 2, and 5 of the complaint also pray for relief by way of construction of the deeds in the light of extraneous matter alleged. I do not believe that this court intends to hold that relief by way of deed construction is available in this case, and concurrence in the end result should in no wise be construed as an abandonment of certain fundamental principles of the substantive law of Illinois.

"These principles and decisions have established that where the language of a deed has a settled legal meaning the instrument itself is the only criterion of the intention of the parties and extrinsic evidence is not admissible to aid in its construction; (Cases cited) that a conveyance of 'all coal and other mineral' has a settled legal meaning and does include oil and gas, with incidental exploration, development and production rights (Cases cited); that the enumeration of other and incidental mining rights in the habendum clause of a conveyance of "all coal and other mineral" does not derogate from, but enlarges the express and implied rights included in the granting clause. (Cases cited.)"

Thus it would appear that the contention of Kline, et al. that "coal and other mineral" does not convey oil and gas as

a matter of law is diametrically opposed to the established law of the State of Illinois and accordingly avails them nothing.

The contention of Kline et al. that the deed is ambiguous is based on the fact that the words "at coal depth" are interlined into the printed portion of the deed and thus create ambiguity in the meaning intended to be placed in the deed by the parties. These words are interlined in the habendum clause in the deed and appear in that portion of the deed pertaining to the right to use rooms, entries and mining ways under the surface of the tracts. The interlineation of these words does not create an ambiguity in the granting clause.

That the plaintiffs are not entitled to have this deed construed is amply established by Illinois law as stated by the Justices of the Illinois Supreme Court in the excerpts from the opinion hereinabove set out.

Thus it would appear that the only avenue of relief available to the counter-defendants, Kline et al., is through the principles of reformation.

A reformation action rests upon a theory that the parties had reached an understanding between themselves; but in reducing it to writing, through mutual mistake or through mistake on one side and fraud on the other, some provision which had been agreed upon was omitted; and the action is to so change the instrument as written to conform it to the contract agreed upon by inserting the provision omitted or by striking one inserted by mutual mistake. A court of chancery may reform an instrument so as to make it conform to the intention of the parties and the agreement between them.

Counter-defendants, Kline et al., assert that local custom and understanding of the words "coal and other minerals" at

the time of the execution of the deed between Samuel Brown and Theodore Rassieur was not deemed to include oil and gas underlying the premises.

These counterdefendants have introduced in evidence a great number of deeds pertaining to the conveyance of coal in Bond County, Illinois, from various landowners. The deeds involved generally contain the printed statement "all coal and other mineral under the surface of the following described tracts of land." In some deeds the words "and other mineral" have been stricken. In other instances the words "all coal and other mineral" remain unchanged. Other deeds contain the words "except oil, gas and other precious metals." Still other deeds contain the words "except oil and gas."

These counterdefendants also introduced a quit claim deed from Theodore Rassieur and Carrie M. Rassieur, his wife, to Donk Bros. Coal & Coke Company, which purports to convey the lands and interests in lands acquired by Theodore Rassieur in Bond County, Illinois. By this deed Theodore Rassieur and his wife purport to convey to Donk Bros. Coal & Coke Company the interest in the land they had acquired in Bond County. It is interesting to note that the interests in the lands conveyed are separated so that only the interests which were acquired by Rassieur and his wife were conveyed to Donk Bros. Coal & Coke Company. This deed contains 87 separate entries of parcels of land. In this deed parcels Nos. 1 through 54, inclusive, are preceded by the words "all coal and other mineral under the surface of the following described tracts of land"; entries Nos. 55 through 68, inclusive, are preceded by the statement "also all coal under the surface of the following described tracts of land"; entries Nos. 69 and 70 are prefaced by the statement "also all coal and other mineral, except oil, gas and other precious metals, under the surface of the following de-

scribed tracts of land." Nos. 71 through 78, inclusive, are prefaced by the statement "also all coal and other mineral except oil and gas under the surface of the following described tracts of land." Entries Nos. 79 through 87, inclusive, are preceded by the statement "also all coal below the depth of one hundred and twenty-five feet under the surface of the following described tracts of land."

Mr. William Ganzer, called by Kline et al., testified he had been instrumental in obtaining a number of options in the area during the years preceding and subsequent to the conveyance of the deed here in dispute. He stated that in pursuing his task of obtaining options it was his intention to obtain options for coal only; that he did not intend to option the lands for anything other than coal underlying same and the right to mine the coal. He testified on cross examination that he was not present at the time the deed was executed by Samuel J. Brown conveying the coal and other mineral to Rassieur and he had no idea as to the conversation which took place or whether any matters concerning the mineral to be obtained by virtue of the lease was discussed by the parties.

[4] The Court has examined the evidence relevant to the allegations of the counterdefendants, Kline et al., that there was a general understanding in the community concerning the conveyance of coal and other mineral and their allegation that such understanding was that it did not convey oil and gas, and finds that the evidence is insufficient to establish such an understanding in the community. As evidenced by the number of changes in the deeds conveying coal and other mineral in the area, it appears that when the parties intended to limit the interest to be conveyed, additional words were inserted in the deed to exclude those minerals not intended to be conveyed or the words "and other minerals" were stricken. The

Court finds that there was no understanding in the community where the property in dispute is located, at the time of the execution of the deeds from Samuel J. Brown by which the coal and other mineral were conveyed, to the effect that the words "coal and other mineral" had anything other than their usual legal meaning.

[5] As additional evidence that it was not the intention of the parties that oil and gas be conveyed by the term "coal and other mineral," the counterdefendants, Kline et al., attempted to introduce their Exhibit 17 (which will hereafter be referred to as Exhibit K-17) under the ancient document rule. The offered document is a photostatic copy of a notice of acceptance of coal rights under option as it was recorded in the office of the Clerk of the Circuit Court and Ex-Officio Recorder for Bond County, Illinois, which purported to give notice of acceptance of Nancy A. Brown, who was a sister to Samuel J. Brown and resided in the home of Samuel J. Brown.

The document in question was said to be on a form of substantially the same type as other Notice of Acceptance of Coal Rights Under Option forms, the originals of which were introduced in evidence, except that at the bottom of the notice and between the date and signature there appears the following:

> "In response to your inquiry regarding the phrase 'other minerals' it is my intention to buy only the coal and such other minerals as may be mined with the coal at coal depth."

The document is signed "Theodore Rassieur by C. C. Terry His Agent and Attorney." The document is dated the 4th day of June A.D. 1907 and was not recorded until the 17th day of November A.D. 1947 — more than 40 years after it was executed.

(Opinion of the U. S. District Court on the Merits)

At the trial the plaintiffs and some counterdefendants asked to examine the original document and were informed that it was not available for examination, that it had been lost subsequent to having been recorded. Subsequent to the trial, the counterdefendants, Dork Bros. Coal & Coke Company, examined the document, recorded in Bond County, Illinois, and upon comparing it with other notices of acceptance of coal rights under option found that this particular document contained a great number of variances between it and other documents of similar nature. Upon making this discovery, a motion to submit additional evidence was promptly made to the Court in order to clarify any questions concerning the document's authenticity. A hearing was granted. During the course of this second hearing it developed that one Alva Nance had presented a document similar to the one which is here in dispute to the Circuit Clerk and Ex-Officio Recorder of Bond County, Illinois and asked that it be recorded.

Alva Nance testified at the first hearing that he had presented the document to the Recorder and that it was recorded; that it had subsequently been returned to him and had been lost. At the second hearing Alva Nance testified he had taken the document to the Recorder's office for recording; that the Recorder stated he was unable to read it and asked him if he could decipher parts of the document for him; that he then took the document to his office and typed out what he believed to be the exact wording of the document; that he then returned the original document together with his typewritten facsimile to the Recorder's office and that it was recorded.

The typist who was employed in the Recorder's office for the purpose of typing the various documents into the official records in the Recorder's office of Bond County testified that she had in fact recorded the document in almost exactly the

same manner in which it was given to her. She stated she did not remember having seen two documents, that she did not recall having seen the original document but merely was presented with the document which had been typed by Alva Nance, and that she had typed it into the record exactly as it was given to her.

The comparison of the document which was recorded with other documents of the same nature which were executed in or about the year 1907 discloses that the recorded Notice of Acceptance of Coal Rights Under Option in dispute is substantially different in a number of details from the other documents of similar import which were executed about the same time. There is no adequate showing that the purported ancient document was in fact recorded, nor was this document available for inspection by the Court.

If this Court were to admit the Notice of Acceptance of Coal Rights Under Option (Exhibit K-17) under the ancient document rule, it would in effect be stretching that theory out of all proportion. Such action would open the door for anyone in the future to present fraudulent and spurious documents into evidence. Exhibit No. K-17 will not be admitted into evidence and will not be considered as evidence in this case, since in the opinion of the Court it smacks of fraud.

Examining the entire evidence, it is not possible to say that there has been any substantial evidence which would justify this Court in reforming the deed between Samuel J. Brown and Theodore Rassieur so as to insert a meaning other than its established legal meaning. The evidence presented completely fails to show that the intentions of the parties were any other than to convey the coal and other mineral as is stated in the deed and, accordingly, reformation will be denied.

(Opinion of the U. S. District Court on the Merits)

The counterdefendants, Carl E. Moses, David R. Stewart, and Donk Bros. Coal & Coke Company, and the plaintiffs, as an additional argument in support of their claim, assert that the counterdefendants, Kline et al., and their predecessors in title, are guilty of laches. This defense may have some merit; however, the Court will not consider the allegations of laches since the facts set out hereinabove are determinative of the issues involved."

The Court finds that judgment should be entered for the plaintiffs, Stewart Oil Company, a corporation; Michigan Oil Company, a corporation; Stewart Producers, Inc., a corporation; Kenneth Patterson; G. F. Stewart; W. Rolland Stewart; Frank J. Tiernan; and Morris Yarbrove; and for the counterdefendants, Carl E. Moses, David R. Stewart, and Donk Bros. Coal & Coke Company, as their several interests appear, and against the counterdefendants, Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking, A. P. Wagemann, John J. Steiner, and Josephine M. Steiner.

The above and foregoing shall be considered findings of fact and conclusions of law.

Parties to settle the order.

APPENDIX "C"

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 13842 September Term, 1962 January Session, 1963

Stewart Oil Company, a Corporation; Michigan Oil Company, a Corporation; Stewart Producers, Inc., a Corporation; Kenneth Patterson; G. F. Stewart; W. Rolland Stewart; Frank J. Tiernan & Morris Yarbrove, Plaintiffs-Appellees,

vs.

Sohio Petroleum Company, Defendant and Counter Claimant,

vs.

Walter E. Kline; Stella P. Kline; R. E. Hayes; W. T. Frederking and A. P. Wagemann, Counter Defendants-Appellants,

and

Carl E. Moses; David R. Stewart and Donk Bros. Coal & Coke Company, Counter Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Illinois

April 10, 1963

(Opinion of the U. S. Court of Appeals)

Before DUFFY, SWYGERT and MAJOR, *Circuit Judges*.

SWYGERT, *Circuit Judge*. Plaintiffs-appellees, all citizens of Michigan, brought suit against the Sohio Petroleum Company, an Ohio corporation, to recover their share of the proceeds from the sale of oil produced, saved and marketed to Sohio by plaintiffs together with counterdefendants, Carl E. Moses and David R. Stewart. The Michigan plaintiffs are assignees of counterdefendants-appellees, Carl E. Moses and David R. Stewart, citizens of Illinois, whose title rests on a lease of the oil interests from counterdefendant, Donk Bros. Coal & Coke Company, an Illinois corporation, which retained a one-eighth royalty interest. It is admitted that Carl E. Moses and David R. Stewart reserved certain overriding royalty interests in the oil and gas lease which they assigned to the Michigan plaintiffs.

Sohio answered the complaint and counterclaimed, alleging possession but not legal ownership of the money (oil proceeds), and sought adjudication of conflicting claimants' rights to the money.[1]

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[1] The amended counterclaim reads in part:

"3. That there appears of record two oil and gas leases from the adverse claimants mentioned above, one dated October 30, 1953 filed November 19, 1955, in Book 44, page 392, from Walter E. Kline and Stella P. Kline, his wife, to W. T. Frederking and A. B. Wagemann, and the other dated September 21, 1956, filed September 24, 1956, in Book 47, page 37, from R. E. Hayes and wife, Lillian Mae Hayes, to W. T. Frederking; that in addition there appears of record a deed from John M. Steiner and Josephine M. Steiner to themselves as joint tenants, executed in the year 1954, although the records reveal that these parties previously had conveyed the land in 1942; that in assignments from Carl E.

The District Court's memorandum opinion, on a motion to dismiss, is reported at 185 F. Supp. 765; and the final opinion, disposing of the case on the merits, is reported at 202 F. Supp. 952. This appeal is taken by counter-defendants-appellants from the decision rendered against them on the merits. They question jurisdiction of the District Court over the subject matter, the existence of diversity of citizenship of the parties necessary to support jurisdiction, as well as legal conclusions, findings of fact, and evidentiary rulings of the trial judge.

As to all but the jurisdictional question of the diversity of citizenship requirements of what turned out to be an interpleader action, we are satisfied that the opinions of

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Moses and David R. Stewart, lessees of Donk Bros. Coal and Coke Company, 1/16 of 7/8 overriding royalty interest was reserved by Carl E. Moses and 1/32 of 7/8 overriding royalty interest was reserved by David R. Stewart.

* * * * *

"7. That this counterclaimant is under no liability of any kind to the claimants or any of them, except such liability as results from the purchase of oil from the above premises, and which will be purchased from time to time in the future, and it does not know, nor can it ascertain to whom the proceeds should be paid on account of the adverse claims that have been asserted thereto, and cannot without hazard undertake to decide the validity of the respective claims and is willing [sic] to take the risk of so deciding.

"8. That in justice and in equity, the counterclaimant should not be compelled to become involved in a dispute of said claimants, but such claimants should be required to litigate and settle their dispute between themselves without in any manner involving this counterclaimant, and counterclaimant says that it has been informed that further suits will be brought by said rival claimants for the same monies."

the District Court fully and completely delineate the issues and correctly decide them. Although all parties at one stage of the proceedings stipulated as to the jurisdiction of the District Court, appellants later raised the question anew and now reassert it on appeal. We feel it incumbent on us to discuss their contention in this regard with more particularity than the summary treatment accorded it by the District Court.

Although we believe jurisdiction in the interpleader action can be upheld on the basis of ancillary jurisdiction arising out of the filing of the original suit by the Michigan plaintiffs against an Ohio corporation, and waiver of venue by the parties, we need not rest our decision on that basis.

We believe that Sohio's interest was more than that of mere stakeholder. In its amended counterclaim, Sohio asked:

> "3: That the Court adjudge whether the plaintiffs, Donk Bros. Coal and Coke Company, Carl E. Moses and David R. Stewart, on the one hand, or R. E. Hayes, Walter E. Kline, Stella P. Kline, W. T. Frederking, A. B. Wagemann, John J. Steiner and Josephine M. Steiner, or any of them, on the other hand, are entitled to the money withheld *and also money that will be accumulated in the future by reason of purchase of oil from said property.*" (Emphasis supplied.)

Determination of the issues in the suit have legal significance for Sohio beyond the proper distribution of money deposited in court. Protection from multiple suits, potential liability as a tortfeasor in having purchased oil from sources having no title to it, and the validity of its purchase

agreements with one of the groups of adverse claimants, all militate against the treatment of Sohio as a nominal stakeholder. Necessarily, it was interested vitally in the identity of future recipients of royalties and in the ownership of the oil. This *interest* of Sohio is sufficient to give it standing under Rule 22, Fed. R. Civ. P., as a proper plaintiff, and the fact that the District Court granted Sohio's request for discharge, does not affect our conclusion. Under Rule 22 interpleader, diversity of citizenship between an interested stakeholder-plaintiff and all adverse claimants is all that is required. No claim is made that any of the adverse claimants are citizens of Ohio; thus, complete diversity existed under Rule 22 on which to base jurisdiction of the District Court.

In the alternative, under statutory interpleader, 28 U. S. C. § 1335, where the stakeholder is totally without interest and is only a nominal party, there is authority that it is sufficient if two adverse claimants with genuinely adverse interests are citizens of different states. *Haynes* v. *Felder*, 239 F. 2d 868 (5th Cir. 1957). On this basis diversity of citizenship exists since appellants, citizens of Illinois, have interests adverse to the original plaintiffs, all citizens of Michigan. The fact that three citizens of Illinois retained interests in the lease assigned to the Michigan plaintiffs, separate legal entities, does not make their interests identical with those of the Michigan plaintiffs since, as stated in *Guth* v. *Texas Co.*, 155 F. 2d 563, 566 (7th Cir. 1946):

> "The obligation to pay the lessors their royalties in proportion to their respective interests in the gas, gasoline, and petroleum distillates produced and in possession of the defendant was a *several* obligation

and the plaintiff could sue separately for his proportion of the royalty." (Emphasis supplied.)

Therefore, even the doctrine of realignment of the parties, as enunciated by the United States Supreme Court in *Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941), would not destroy the fact that there are two adverse groups of claimants—one group citizens of Michigan, and the other group citizens of Illinois.

Under either view we believe the District Court correctly determined that it had jurisdiction.

All other substantial questions raised on appeal were answered correctly in the District Court's opinions, cited above, and we adopt the opinions as our own. We have considered the questioned evidentiary rulings and find the objections to be without merit.

The judgment is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "D"

JUDGMENT OR DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Wednesday, April 10, 1963

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. J. Earl Major, Circuit Judge

No. 13842

Stewart Oil Company, et al.,
Plaintiffs-Appellees,
vs.
Walter E. Kline, et al.,
Counter Defendants-Appellants,
and
Carl E. Moses, et al.,
Counter Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Illinois

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX "E"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Art. III, Sec. 2, in pertinent part:

"Section 2. The judicial Power shall extend, * * * to Controversies * * * between Citizens of different States * * *"

STATUTES INVOLVED

28 U.S.C.A., Sec. 1332, in pertinent part:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: (1) Citizens of different states;"

28 U.S.C.A., Sec. 1335, in pertinent part:

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or prop-

erty of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court * * *"

28 U.S.C.A., Sec. 1359, provides:

"A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

28 U.S.C.A., Sec. 1392, provides:

"(a) Any civil action not of a local nature against defendants residing in different districts in the same state, may be brought in any of such districts.

(b) Any civil action of a local nature, involving property located in different districts in the same state, may be brought in any of such districts."

28 U.S.C.A., Sec. 1655, provides in pertinent part:

"In an action in a district court to enforce any lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district, where any defendant cannot

be served within the state, or does not voluntarily appear, the Court may order the absent defendant to appear or plead by a day certain * * * When a part of the property is within another district, but within the same state, such action may be brought in either district."

Illinois Revised Statutes, Chapter 110, Sec. 7, provides in pertinent part:

"7. Venue—Public Corporations—Local Actions—Libel—Insurance Companies.

§7 (1) * * *

(2) Any action to quiet title to real estate, or to partition or recover possession thereof, or to foreclose a mortgage or other lien thereon, must be brought in the county in which the real estate or some part of it is situated."

Office-Supreme Court, U.S.
FILED
AUG 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 290

STEWART OIL COMPANY, A CORPORATION; MICHIGAN OIL COMPANY, A CORPORATION; STEWART PRODUCERS, INC., A CORPORATION; KENNETH PATTERSON; G. F. STEWART; W. ROLLAND STEWART; FRANK J. TIERNAN AND MORRIS YARBROVE,
Plaintiffs-Respondents,

vs.

SOHIO PETROLEUM COMPANY,
Defendant and Counter Claimant,

vs.

WALTER E. KLINE; STELLA P. KLINE; R. E. HAYES; W. T. FREDERKING AND A. P. WAGEMANN,
Counter Defendants-Petitioners,

and

CARL E. MOSES; DAVID R. STEWART AND DONK BROS. COAL & COKE COMPANY,
Counter Defendants-Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 290

STEWART OIL COMPANY, A CORPORATION; MICHIGAN OIL COMPANY, A CORPORATION; STEWART PRODUCERS, INC., A CORPORATION; KENNETH PATTERSON; G. F. STEWART; W. ROLLAND STEWART; FRANK J. TIERNAN AND MORRIS YARBROVE,

Plaintiffs-Respondents,

vs.

SOHIO PETROLEUM COMPANY,

Defendant and Counter Claimant,

vs.

WALTER E. KLINE; STELLA P. KLINE; R. E. HAYES; W. T. FREDERKING AND A. P. WAGEMANN,

Counter Defendants-Petitioners,

and

CARL E. MOSES; DAVID R. STEWART AND DONK BROS. COAL & COKE COMPANY,

Counter Defendants-Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondents, Stewart Oil Company, a Corporation; Michigan Oil Company, a Corporation; Stewart Producers, Inc., a Corporation; Kenneth Patterson, G. F. Stewart,

W. Rolland Stewart, Frank J. Tiernan, Morris Yarbrove, Carl E. Moses, David R. Stewart and Donk Bros. Coal & Coke Company, hereby answer and oppose the Petition for Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on April 10, 1963, in the above entitled cause.

OPINIONS BELOW.

The Court of Appeals Opinion here involved is reported in 315 F. 2d 759. As Petitioners state, the District Court opinions appear in 185 F. Supp. 765 and 202 F. Supp. 952.

JURISDICTION FOR REVIEW.

The judgment sought to be reviewed was entered by the Court of Appeals for the Seventh Circuit on April 10, 1963. (See Appendix D, page 27a, attached to the petition filed herein), and not on April 15, 1963 as Petitioners state on page 2 of their petition. No petition for rehearing was filed. No extension of time was applied for or granted within which to file Petition for Writ of Certiorari. The petition for Writ of Certiorari was filed herein on July 19, 1963.

Jurisdiction is not properly invoked, as petitioners state, under Supreme Court Rule 38-5 (b) as there is no rule so numbered.

QUESTIONS PRESENTED.

1. Should this Court entertain a Petition for Certiorari filed more than 90 days after the entry of the judgment of the Court of Appeals contrary to 28 USC sec. 2101 (c) and Supreme Court Rule 22(3)—there having been no extension, within the 90 days, as permitted by Supreme Court Rule 34 (2)?

2. Was the District Court without jurisdiction?

3. Has the deed been construed properly under Illinois Law?

4. Are the findings of fact upon which the District Court denied reformation, which findings were sustained by the Court of Appeals, clearly erroneous?

STATUTES AND COURT RULES INVOLVED

28 U. S. C. sec. 1332 (Appendix "A" herein 12).

28 U. S. C. sec. 1335 (Appendix "A" herein 12).

28 U. S. C. sec. 2101 (Appendix "A" herein 11).

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28 U. S. C. Supreme Court Rules, Rule 34 (Appendix "A" herein 11).

Illinois Revised Statutes, 1961, Ch. 110, sec. 7 and 8 (Appendix "A" herein 13).

GROUNDS IN OBJECTION TO REVIEW.

I.

The Petition Should Not Be Entertained.

This Court ought not entertain the petition filed herein 100 days after the entry of the Court of Appeals judgment. The filing of the certified transcript of the record on June 21, 1963 did not comply with Rule 22 (3) which requires both the transcript and petition to be filed within the prescribed time of 90 days. 28 U. S. C. 2101, (c). The fact that the transcript of record was filed well in advance of the time limitation demonstrates that the delay was not caused by the petitioners' inability to obtain the record.

The delay in filing the petition is wholly unexplained, and petitioners, aware that the time limitation was expiring, did not, within the time limitation, apply for an extension of time as permitted by Rules 22 (4) and 34 (2). Perhaps because they knew that such applications are not favored, they chose to flout the rule, and file the petition after the time limitation had expired. Had petitioners, at the time they filed their petition, filed an application for an extension of time to file their petition, the Clerk of this Court would have refused the same under Rule 34 (2). While the Court's rules do not authorize the clerk to refuse to receive a petition presented after the time limitation has expired, the mandate of the rules is certain that the petition must be filed within the time limitation. The course taken by petitioners here circumvents the rules and should not be tolerated.

II.

The District Court Had Jurisdiction.

Federal jurisdiction stems from the initial action by Plaintiffs, all Michigan residents, to recover payment for "working interest oil" which they had discovered, severed from the land, possessed as personal property and marketed to the Defendant, Sohio Petroleum Company, an Ohio Corporation, who had so accepted the oil but failed to pay for it.

No other person, firm or corporation was a necessary party to this action and Plaintiffs did not contemplate any quiet title proceedings or deem them necessary in view of the Illinois Law with respect to oil and gas ownership through a "coal and other mineral" conveyance. Sohio Petroleum Company filed its counterclaim and "brought in" the additional parties pursuant to Rule 13(h) of the Rules of Federal Practice and Procedure which so authorizes and specifically provides that "their joinder will not deprive the court of jurisdiction of the action."

When a district court has jurisdiction of the principal action, it also has cognizance of any ancillary proceeding therein, regardless of citizenship of the parties, the amount in controversy or any other factor that would ordinarily determine jurisdiction. *Eichel* v. *U. S. F. & G. Co.*, 245 U. S. 102, 104; 62 L. ed. 177, 177-178 (1917); *United States* v. *Acord*, 10th Cir. 209 F. 2d 709, 712 (1954); *Glenn Falls Indemnity Co.* v. *U. S.*, 9th Cir. 229 F. 2d 370, 373-378 (1955).

Petitioners argue that the Federal Interpleader Statute (sec. 1335, Title 28 U. S. C.) does not provide jurisdiction support for the Sohio Petroleum Company Counterclaim. This statute merits and receives liberal construction. It is designed not only to protect stakeholders from

double or multiple liability but, also, to protect them from trouble and expense of double or multiple litigation. *New York Life Ins. Co.* v. *Welch*, C. A. D. C., 1961, 297 F. 2d 787, 790; *Metropolitan Life Ins. Co.* v. *Mason*, 3rd Cir. 98 F. 2d 668, 669 (1938); *U. S.* v. *Sentinel Fire Insurance Co.*, 5th Cir., 178 F. 2d 217, 225 (1949); *Bierman* v. *Marcus*, 3rd Cir. 246 F. 2d 200, 205 (1957), cert. denied 336 U. S. 93. "Two or more" of the "adverse claimants" were of diverse citizenship "as defined in sec. 1332 of this title". *28 U. S. C., Section 1335.* Surely, a stakeholder is not deprived of the statutory protection through the existence of additional claimants with common state citizenship. *Holcomb* v. *Aetna Life Ins. Co.*, C. A. Oklahoma, 1958, 255 F. 2d 577, 582, cert. denied 358 U. S. 879.

Furthermore, Sohio Petroleum Company, is an Ohio Corporation, whereas the remaining parties are citizens of other states. Consequently, the counterclaim is independently maintainable (as an equitable interpleader action) under the general diversity statute. *Brisacher* v. *Tracy-Collins Trust Co.* 227 F. 2d 519, 525 (C. A. 10, 1960); *John Hancock Mutual Life Insurance Co.* v. *Kraft et al.*, 200 F. 2d 952, 953 (C. A. 2, 1953).

Petitioners' concern over the land situs is of no consequence. The District Court possessed jurisdiction of all parties having or claiming any right, title or interest. It has been long recognized that in these situations a Federal Court may effectively settle title disputes with respect to lands situate outside its territorial jurisdiction. *Miller* v. *Dows*, 94 U. S. 444, 449; 24 L. ed. 207, 209 (1876); *Carpenter* v. *Strange*, 141 U. S. 87, 105, 106; 11 S. Ct. 960, 966, 35 L. ed. 640, 647 (1891); *Fall* v. *Eastin*, 215 U. S. 1, 8; 30 S. Ct. 3, 6; 54 L. ed. 65, 69 *et seq.* (1909). Illinois courts are likewise empowered. *Gordon* v. *Gordon*, 1955, 6 Ill. 2d 572, 576-577.

Furthermore, the Illinois Rule that real estate quiet title

actions are to be brought in the County where the property or some part of it is situated is only a matter of venue and not a jurisdictional limitation. This is evident from a reading of Sections 7 and 8 (the applicable provisions) of the Illinois Civil Practice Act wherein it is also provided that no such action is void because of improper venue and that "all objections of improper venue are waived by a defendant unless a motion to transfer to a proper venue is made by him on or before the date upon which he is required to appear or within any further time that may be granted him to answer or move with respect to the complaint." An action for settlement of Bond County land title disputes could be effectively maintained in St. Clair County or any other Illinois County subject, only, to a venue transfer pursuant to timely motion as provided by the Civil Practice Act. Consequently, federal jurisdiction is also sustained by application of the principle that the law of the forum determines whether an action is transitory or strictly local.

The District Court jurisdiction is sustainable: (a) As ancillary to the initial action; (b) Under the federal interpleader statute; (c) Under the general diversity statute; (d) By the Illinois Law with respect to venue; and (e) Capacity to fully and effectively settle the controversy through exercise of its jurisdiction over all parties having or claiming any right, title or interest in the subject matter.

III.

The Deed Construction Is Governed by Illinois Law and Has Been in Accordance Therewith.

The decision of the Court of Appeals affirming the District Court's action in construing the deed in question to convey oil and gas is in strict conformity with the law of Illinois.

Under Illinois Law, a conveyance of "all coal and other mineral" has a settled meaning and includes oil and gas. *Shell Oil Co.* v. *Dye*, 7 Cir., 135 F. 2d 365, 368, 369 (1943); *Shell Oil Co.* v. *Moore*, 382 Ill. 556, 565, 48 N. E. 2d 400, 405 (1943); *Jilek* v. *C. W. & F. Coal Co.* 382 Ill. 241, 245, 47 N. E. 2d 96, 98 (1943); *Walter* v. *Sohio Petroleum Co.*, 402 Ill. 33, 41, 83 N. E. 2d 346, 349 (1948); *Adkins* v. *Adams*, 7 Cir., 152 F. 2d 489, 492 (1945).

The Illinois Supreme Court has held that a "coal and other mineral" deed identical in language and content with the one here involved, except as to parties grantor and land description, is unambiguous and conveys oil and gas as a matter of law. *Kate B. Nance et al.* v. *Donk Bros. Coal and Coke Co.* 13 Ill. 2d 399, 407-410; 151 N. E. 2d 97, 101-103 (1958).

Where there is no ambiguity in the terms used in a deed or where the language of a deed has a settled legal meaning, the instrument itself is the only criterion of the intention of the parties and extrinsic evidence is not admissible to aid in its construction. *Wilson* v *Wilson*, 268 Ill. 270, 273; 109 N. E. 36, 37 (1915); *Keen* v. *Cleveland C. C. & St. L. Ry. Co.* 392 Ill. 362, 371; 64 N. E. 2d 499, 503 (1945); and *Roberts* v. *Dazey*, 284 Ill. 241, 244, 119 N. E. 910, 911 (1918).

It is evident from the petition filed herein, that petitioners disagree with the local law of Illinois as interpreted by its courts. It cannot be seriously urged that the Court of Appeals has rendered a decision in conflict with applicable local decisions.

Petitioners' disagreement with these decisions cannot change the Illinois Law or its application herein. They were without any legal title to the oil or its proceeds and could only recover through a reformation of the deed. They failed to prove any right of reformation. The evidence and District Court's findings refute the allegation

that the parties to the "coal and other mineral" conveyance did not intend to include the oil and gas. Consequently, even though the instrument were taken as ambiguous, and subject to construction through the aid of extrinsic evidence, the ambiguity would have been and necessarily be resolved *against* the Petitioners.

IV.

The Findings of Fact Are Supported and Further Review Is Unwarranted.

Petitioners sought reformation of the deed made on September 21, 1907 because of mutual mistake of the grantor and grantee, or because of the fraud of the grantor and mistake of the grantee. In such a case Illinois law requires the proof to be strong and convincing. *Hardy v. Greathouse*, 406 Ill. 365, 373, 94 N. E. 2d 134, 138 (1950). A mere preponderance of the evidence is not sufficient. *Tope et al. v. Tope et al.*, 370 Ill. 187, 191, 18 N. E. 2d 209, 231 (1938).

The District Court found the evidence offered insufficient to warrant reformation, and the Court of Appeals affirmed the findings. When the Court of Appeals has accepted the District Court's findings, there must be a strong case to justify this Court in setting aside such findings. *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U. S. 275, 278, 88 L. ed. 721, 724 S. Ct. (1944). *Graver Tank & Manufacturing Co. v. Linde Air Products Company*, 336 U. S. 271, 275, 93 L. ed. 676 St. Ct. This court stands in the same position as the Court of Appeals in reviewing the findings of the District Court. *McAllister v. United States*, 348 U. S. 19, 20, 99 L. ed. 20, 24, 75 S. Ct. 6 (1954). The findings are clearly erroneous *only* when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

In this case, because of the lapse of time, the evidence in support of, and in opposition to, the asserted right to reform an instrument more than fifty years old was at best sketchy. There was no direct evidence to prove what transpired between the parties at the time the deed in question was executed and delivered. (Appellants' Appendix in Court of Appeals, p. 109.) The evidence offered by all parties was principally collateral evidence pertaining to collateral transactions from which conflicting inferences might be drawn.

No useful purpose will be served in again reviewing the mass of exhibits and testimony to judge the validity of the inferences drawn and conclusions reached by the District Court.

CONCLUSION.

The petition has been filed after the "time prescribed by law" (28 U. S. C. 2101, (c), and Rule 22), and ignores the guide lines "governing review on certiorari" prescribed by Rule 19. It is simply a reargument of matters fully presented to and duly considered by the Courts below. There is no basis for further review.

Respectfully submitted,

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APPENDIX "A".

STATUTES AND COURT RULES INVOLVED.

28 U. S. C. Sec. 2101, in pertinent part:

"'(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

28 U. S. C. Supreme Court Rules, Rule 22 in pertinent part:

"Review on certiorari—time for petitioning.

1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case * * *

"2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case * * *.

"3. A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the Clerk within the time prescribed by law."

"4. Application for extension of time within which to file a petition for writ of certiorari * * * must set forth with specificity the reasons why the granting of an extension of time is deemed justified. * * * Such applications are not favored."

28 U. S. C. Supreme Court Rules, Rule 34, paragraph 2:

"Whenever any justice of this court is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, an application seeking such

extension shall be timely if it is presented to the clerk within the period sought to be extended. The clerk will refuse to receive any application for extension sought to be presented after expiration of such period."

28 U. S. C. Supreme Court Rules, Rule 19 in pertinent part:

"Considerations governing review on certiorari.

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

28 U. S. C. Sec. 1332, in pertinent part:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs, and is between:

(1) Citizens of different States;

(2) * * * * *

(3) * * * * *"

28 U. S. C. Sec. 1335, in pertinent part:

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm or corporation, association or society having in his or its custody or possession money or property of the value of $500.00 or more, * * * if

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property * * * and if (2) the plaintiff has deposited such money or property * * * into the registry of the court * * *

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

28 U. S. C. Rules of Civil Procedure, Rule 13 in pertinent part:

"(h) Additional Parties May Be Brought In. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action".

Illinois Revised Statutes, 1961, Bar Association Edition, Ch. 110, in pertinent part:

"Article II. Venue.

"5. * * *

"6. * * *

"7. Venue—Public corporations—Local actions—Libel—Insurance companies. * * * (1) * * * (2) Any action to quiet title to real estate, or to partition or recover possession thereof or to foreclose a mortgage

or other lien thereon, must be brought in the county in which the real estate or some part of it is situated"

• • • • •

"8. Wrong court or venue—Waiver—Motion to transfer. (1) No order, judgment or decree is void because rendered in the wrong venue, except in case of judgment by confession as provided in section 50(4) of this Act. No action shall abate or be dismissed because commenced in the wrong venue or court if there is a proper venue or court of competent jurisdiction to which the cause may be transferred.

"(2) All objections of improper venue are waived by a defendant unless a motion to transfer to a proper venue is made by him on or before the date upon which he is required to appear or within any further time that may be granted him to answer or move with respect to the complaint" • • •.